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Richard Hoyt and Maude S. Hoyt v. Wasatch Homes, Inc. : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

IN THE SUPREME COURT
OF THE
STATE OF UTAH

RICHARD R. HOYT AND
MAUDE S. HOYT,
Plaintiffs and Respondents,

vs.

WASATCH HOMES, INC., a
Utah Corporation,
Defendant and Appellant

Case No. 7919

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Come now Richard R. Hoyt and Maude S. Hoyt the respondents above named, and respectfully petition this honorable Court for a rehearing in the said cause as to the items hereinafter mentioned, and as a basis for such rehearing allege as follows:

1. The Court erred in concluding that "the parties did come to agreement as to the terms and time of payment of the $19,000 balance and the security to be furnished by the purchasers (Johnsons)".

2. The Court erred in concluding that "The plaintiff Richard R. Hoyt himself admitted that the terms contained in the Eggertson memorandum were acceptable to him."

3. The Court erred in concluding that "there existed no point of difficulty of any importance between Hoyt and the purchasers (Johnsons)."

4. The Court erred in concluding "There is no indication in the record that Hoyt ever voiced any dissatisfaction with the security arrangements except his own failure to inspect the Montana property. Plainly this dereliction on his own part is of no avail to him in refusing to go forward with the contract."

5. The Court erred in concluding that the Johnsons had made arrangements for another improvement bond.

6. The Court erred in concluding that "if it had been Johnsons who had failed and refused to complete the transaction, Hoyt was authorized by the Agreement to retain and forfeit the $1,000 as 'liquidated and agreed damages.'"

7. The Court erred in concluding as follows: "That he (Hoyt) was aware that Johnsons had preserved their rights under the contract, were willing and able to complete the transaction, and that he was therefore not in a position to forfeit them out, is clearly manifest by the fact that he paid them $1,000 for the contract of rescission."

8. The Court erred in concluding that the Johnsons had not failed in their obligations, and that they were ready, willing and able buyers.

9. The Court erred in failing to do as it stated in its opinion that it was obliged to do, namely: "To take the evidence and all fair inferences therefrom in the light most favorable to plaintiffs because they prevailed in the lower courts."

10. The Court erred in reversing and remanding the judgment of the trial court with directions to vacate judgment in favor of plaintiffs and enter judgment in favor of defendant on its counter claim.

ROMNEY & NELSON
Attorneys for Respondents

BRIEF OF RESPONDENTS

We respectfully submit that this petition for rehearing was presented only after a careful examination of the opinion of this honorable Court, which led to the sincere conviction that the said opinion is based largely upon erroneous conclusions drawn from the evidence in the record. We shall attempt in this brief argument to show the Court where the overwhelming weight of the evidence does not sustain the conclusions arrived at by this honorable Court in its majority opinion. This brief necessarily deals primarily with the facts rather than the law, for the reason that the alleged errors, whch we shall attempt to point out, are primarily errors of fact rather than law.

We shall take up the points raised in our petition for rehearing in the same order as they are set out hereinabove:

1. In the opinion of this Court the following statement appears: "After further negotiations, the parties did come to agreement as to the terms and time of payment of the $19,000 balance and the security to be furnished by the purchasers (Johnsons)."

The only testimony on this point is that of Richard R. Hoyt, Mark B. Eggertsen, Beatta Johnson and Elmer J. Johnson.

Hoyt's testimony is that the discussion in Eggertsen's office "was just a discussion and that after we had ironed out some of our other problems and they were satisfactory to both of us, then we would come back." (R. 19); also, concerning the terms of the memorandum (Exhibit 1), that neither of the parties agreed to the same (R. 22); also, that when they left Eggertsen's office "we told him we had other matters to discuss before we could agree on a contract." (R. 23).

Eggertsen testified, concerning Exhibit 1: "I made a memorandum of the items that it seemed they were trying to cover so that when all of the details were worked out that we could prepare the Uniform Real Estate Contract covering the purchase and sale."; and, further: "There is nothing definite about it. It was merely just preliminary to a final draft and so on, if all of the things they were discussing were worked out, as I recall it." (R. 35). He also testified as follows: "Well, the conversation was terminated when they both—both parties seemed to agree

that it was—there were too many indefinite points, that we couldn't reduce it to contract at that time." (R. 36). Eggertsen further confirmed the fact that Hoyt and Johnson, before they left his office, informed him in substance that they wanted to discuss the matter further between themselves and would agree not to proceed with the preparation of the uniform real estate contract until some more definite terms were arrived at; and that he understood the memorandum (Exhibit 1) to be only a memorandum of negotiations that were being conducted between them looking to a possible final contract. (R. 38)

The testimony of Beatta Johnson is that the parties were in entire agreement when Exhibit 1 was drawn (R. 46). However, her testimony fails to disclose that the parties ever agreed upon any of the terms of payment of the $19,000. Her testimony further is that they were unable to get a bond, that the General Company turned them down and that she does not know whether U. S. F. & G. turned them down or not. (R. 53). She also testified that they were intending to put up a cash bond for improvements but that they never advised Mr. Hoyt thereof. (R. 57 & 58). Mrs. Johnson further testified that she was employed as a real estate salesman by the appellant Wasatch Homes, Inc. during all the time when these transactions were had. (R. 51)

Elmer J. Johnson merely ratified in substance the testimony of his wife. (R. 61)

We further point out that the agreement (Exhibit C) between the Johnsons and the Hoyts recites in part as follows: "Whereas . . . . the said parties have been negoti-

ating since the said time for the consummation of the sale and purchase of the property, but have been unable to agree upon the terms and conditions of the said proposed purchase and sale;"

The evidence hereinabove recited overwhelmingly establishes that there was no meeting of minds or agreement whatever concerning the method or terms or time of payment of the $19,000.00. It is undisputed that Hoyt had never inspected or passed upon the security which the Johnsons had in mind offering him. Surely it would be most unjust to force the respondents to accept security, whatever it may be, which they never agreed to accept and which they never had an opportunity to inspect or appraise.

2. This Court further stated: "The plaintiff Richard R. Hoyt himself admitted that the terms contained in the Eggertson memorandum were acceptable to him."

It is true that counsel for the appellant attempted strenuously in his cross examination of Hoyt to get him to admit that the terms of Exhibit 1 were acceptable to him. The following is taken from the said cross examination (R. 22 & 23):

"Q Was Mr. Johnson agreeable to the terms as set down in the memorandum by Mr. Eggertson?

A Well, of course, neither one of us agreed to them at that time.

Q I know, but were these terms acceptable to him?

A As far as I know, they were.

Q And were they acceptable to you?

A Not until after we had solved our other problems that confronted us.

Q Now, let we ask you, the terms that are set down here were acceptable to you as far as you were concerned except you wanted to inspect the property in Bozeman?

A And I wanted him to obtain a bond for those improvements.

Q Well, now, let's take it a step at a time. First you wanted to inspect this property in Bozeman which you were to have—

A As security.

Q—a deed for security on, and you wanted the bond posted. Is that right?

A That's right.

Q Now, let me ask you, Mr. Hoyt, if it isn't a fact that when you left Mr. Eggertsen's office you had instructed him to prepare a uniform real estate contract embodying the terms shown in exhibit 1.

A That's incorrect.

Q What had you instructed him to do?

A To just wait until we had solved our other difficulties, and when we did that, we told him we would come back. When we left his office, we told him we had other matters to discuss before we could agree on a contract.

We respectfully submit that this testimony does not establish that the terms of the said Exhibit 1 were wholly acceptable to Hoyt. This is particularly true in view of the light of Hoyt's other testimony that there were other things undetermined, such as the appraisement of the Montana property (R. 18), the necessity of Johnson's paying for the improvements on the 20 lots (R. 18), the Johnsons' inability to furnish the bond (R. 19), and that the said memorandum was merely an indication of a preliminary discussion. (R. 19)

3. This Court further stated that "there existed no point of difficulty of any importance between Hoyt and the purchasers (Johnsons)."

It is apparent from the overwhelming weight of the evidence that there were at least 2 primary points which remained undetermined, namely: First, the method and terms of payment of the $19,000 and, second, the payment for the improvements on the lots, or the furnishing of a bond for the same. It cannot be disputed that these two points of difficulty between the parties did exist, and that according to the evidence of the respondents and their independent witness, Eggertsen, the said matters had not been determined. The only remaining question, therefore, would be whether the said points are "of any importance." It would seem to be apparent that the time and method and terms of payment of the sum of $19,000 is of exceeding importance to the respondents. It is a considerable sum, and represents by far the major portion of the entire purchase price. By the same token the security which the appellant had in mind conveying to the respondents for the said payment was of equal importance.

It goes without saying that in the promotion of a subdivision the payment for the improvements thereon are most vital to the progress of the subdivision. This fact is borne out by the testimony of Mark Eggertsen as follows: "As I recall particularly there was the determination of the two properties that were to be security and Mr. Johnson's procuring an improvement bond, and then I made the comment to them that the plat should be completed and filed before any instrument was executed involving the sale of lots. Our statute is quite clear, I pointed out, that it is unlawful to sell a property before it is a legal parcel of land."

4. In referring to the "failure" of Hoyt to inspect the Montana property, this Court stated: "Plainly this dereliction on his own part is of no avail to him in refusing to go forward with the contract."

We are unable to find in the record any testimony to the effect that it was Hoyt's obligation to go to Montana and inspect the Montana property, or that he was derelict in any sense in not inspecting the same. The undisputed testimony of Mr. Hoyt is that Johnson told him he would take him up to Montana for the purpose of appraising the property. (R. 18) We fail to find any basis in the record upon which Hoyt could be charged with any dereliction in this matter.

5. The Court further stated that "The Johnsons both testified that they had made arrangements for another bond; this was not disputed;"

Beatta Johnson testified on cross examination that they tried to get a bond and were turned down by the

"General Company" but that she did not know whether the U.S.F. & G. Company turned them down or not. (R. 53) She further testified on redirect examination that in the forepart of January, 1952, they were going to put up a cash bond for the improvements; that they had a man that was going in with them and put up the cash but that they never advised Mr. Hoyt of that. (R. 57 & 58) We respectfully remind the Court that even if they did have some intention of putting up a cash bond their failure to advise the respondents of their arrangements constituted a failure on their part to make complete arrangements for the bond. Furthermore, the testimony of Beatta Johnson, we submit, does not establish even that final arrangements for such a cash bond had been made.

6. This Court in its opinion states: "if it had been Johnsons who had failed and refused to complete the transaction, Hoyt was authorized by the Agreement to retain and forfeit the $1,000 as 'liquidated and agreed damages.'"

This legal conclusion does not comport with the decision of this honorable Court in the case of Perkins vs. Spencer, 243 Pac. 2d, 446. In that case the purchaser had occupied the premises for a considerable time and the facts generally seemed to be more favorable to a proper case of liquidated damages than the instant case. In the case at bar, according to the reasoning of this Court, Hoyt was anxious to get the Johnsons out of the transaction and presumably, therefore, would find it difficult to establish any damages at all. In the Perkins v. Spencer case the majority opinion, delivered by Mr. Justice Crockett, recites in part as follows:

"We hold that under the facts of this case, the forfeiture provision amounted to a penalty which is unenforceable. Defendants contend that to so rule nullifies their contract and leaves them with no other recourse than they would have had if no such provision had been included. It is true that this should be done only with great reluctance and when the facts clearly demonstrate that it would be unconscionable to decree enforcement of the terms of the contract. This is such a case.

"(8) When the contract provision is unenforceable, the only way rights of the parties can be adjusted is on the basis of damages ordinarily recoverable for such breach of contract. See Malmberg v. Baugh, supra.

"(9) The vendors are entitled to any loss occasioned them by any of these factors:

(1) Loss of an advantageous bargain.

(2) Any damage to or depreciation of the property;

(3) Any decline in value due to change in market value of the property not allowed for in items nos. 1 and 2; and

(4) For the fair rental value of the property during the period of occupancy.

"The total of such sums should be deducted from the total amount paid in, plus any im-

provements for which it would be fair to allow recovery, and any remaining difference awarded to the plaintiffs."

If this court could conclude in the Perkins v. Spencer case that the forfeiture provision amounted to a penalty it is difficult to see how, in the instant case, the appellant could retain and forfeit the $1,000 as "liquidated and agreed adamages."

7. We refer to this Court's statement as follows: "That he (Hoyt) was aware that Johnsons had preserved their rights under the contract, were willing and able to complete the transaction, and that he was, therefore, not in a position to forfeit them out, is clearly manifest by the fact that he paid them $1,000 for the contract of rescission."

We respectfully refer to the agreement (Exhibit C) which was made between the parties at the time the $1,000 was paid by Hoyt to Johnson. That agreement recites in part: "The said parties have been negotiating since the said time for the consummation of sale and purchase of the property, but have been unable to agree upon the terms and conditions of the said proposed purchase and sale." It should be borne in mind that Hoyt was under the necessity of proceeding with the promotion of his subdivision; that Johnsons' failure to procure an improvement bond and to complete the purchase upon terms agreeable to Hoyt was delaying the entire project; that although Hoyt may have been able to terminate Johnsons' rights without paying any consideration, by means of a court action, such a proceeding would necessarily entail

some delay and expense; that a reasonable solution to the problem was to return to Johnsons the $1,000 which they had paid and to restore the parties to their former status. The fact that Hoyt did this should not in any sense be taken as evidence that Johnsons had fulfilled their part of the agreement. If it should be considered evidence that Hoyt thought that Johnsons had fulfilled their agreement, such fact would be immaterial. It is most likely that Hoyt was willing to return the $1,000 to Johnsons because he had confidence in his right to recover the said sum from the appellant herein. At any rate, Hoyt's willingness to restore the $1,000 to Johnsons should not be considered evidence of anything other than his desire to be fair with Johnsons. Certainly such attitude should not be the basis of penalizing Mr. Hoyt.

8. We contend that the Court's conclusion that the Johnsons had not failed in their obligations, and that they were ready, willing and able buyers, is erroneous for the reasons set forth hereinabove. We deem it unnecessary to repeat the various arguments hereinabove stated.

9. We concur in the Court's statement that it is obliged to take the evidence and all fair inferences therefrom in the light most favorable to plaintiffs because they prevailed in the lower court. However, we respectfully point out that after stating the said rule this Court has utterly failed to follow it.

We have reviewed hereinabove the salient points of the evidence in the record which sustain the findings of the trial court that there was no meeting of the minds of the parties with respect to the sale of the property. We

submit that it cannot be denied that there was competent evidence to sustain such a finding. Even if the evidence is viewed in the light most favorable to the appellants it cannot be said that there is any competent evidence to sustain a conclusion that the respondent ever agreed to accept property which he had never seen nor appraised as security for the payment of $19,000. The most that could possibly be said of the conversation in Eggertsen's office and the memorandum (Exhibit 1) is that it was a discussion of some of the terms of the payment of the $19,000, which was not signed by the parties and which could not possibly be considered as a binding agreement. The Earnest Money Receipt and Agreement (Exhibit A), at best is nothing more than an agreement to attempt to agree in the future in respect to some of the most vital parts of the proposed sale. We submit that if either party attempted to enforce the terms of the agreement as set forth in Exhibit A it would be impossible for any court to determine the rights of the respective parties.

10. In citing the error of this Court in reversing and remanding the judgment, we refer to the argument set forth in each of the 9 points hereinabove, and, without repeating them, make them a part of our argument in support of this citation of error.

Respectfully submitted,
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